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UNITED STATES DISTRICT COURT
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DISTRICT OF NEVADA
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9 Federal Trade Commission,
10 Plaintiff
11 vs.
12 Ideal Financial Solutions, Inc., et al.,
13 Defendants
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Case No.: 2:13-cv-00143-JAD-GWF
Order Granting Second Motion to Strike Notice and Direct Entry of Default; and Denying Motions to Dismiss [Docs. 103, 115, 145]

15 Currently before the Court are: Defendants Michael Sunyich and Melissa Sunyich Gardner's
16 Motions to Dismiss [Docs. 103, 115]; and the FTC's Second Motion to Strike Notice, and Direct
17 Clerk to Entry a Default [Doc. 145]. Finding that Defendants Ideal Financial Solutions, Inc; Ascot
18 Crossing, LLC; Bracknell Shore, LTD; Chandon Group, Inc.; Fiscal Fitness, LLC, and Avanix,
19 LLC, have failed—despite numerous opportunities—to retain counsel and file a proper answer in
20 this action, the Court grants the FTC's Second Motion to Strike, strikes the defendants' April 25,
21 2013, answer to the extent it purports to respond on behalf of these entities and directs the Clerk of
22 the Court to enter default against them. The Court also denies Michael Sunyich and Melissa
23 Sunyich Gardner's motions to dismiss because these defendants failed to demonstrate that the FTC's
24 complaint does not state plausible claims against them.

25 **Background¹**

26 The FTC alleges that since 2009, Defendants—corporate entities and the individuals who
27 controlled them—took money from consumers' bank accounts or billed their credit cards without
28 their knowledge, consent, or prior adequate notice. Doc. 32 at 9. The FTC claims that Defendants

¹ This description is intended only for general background and is not intended as any finding of fact.

1 set up shell companies, established merchant accounts with third-party payment processors, and
 2 billed consumers using these merchant accounts, with charges upwards of \$30. *Id.* at 9-10. For
 3 example, during a 2010 “Debt2Wealth Campaign,” deductions between \$30 and \$40 were charged
 4 to consumers’ credit cards; when those consumers called the phone number listed on the debit
 5 transaction, they were falsely told they had purchased financial counseling services. *Id.* And during
 6 a 2011 “Funding Assurance Campaign,” Defendants deducted approximately \$30 from numerous
 7 consumer accounts without authorization, and falsely told consumers they had purchased payday-
 8 loan-matching services from the Defendants. *Id.* During the 2012 “Avanix Campaign,” consumers
 9 contesting a \$31.96 charge were told they had purchased assistance in completing a payday-loan
 10 application. *Id.* The FTC alleges that numerous other campaigns were instituted by the Defendants
 11 during this time. *Id.*

12 The FTC contends that the high transaction-reversal and return rates indicate a lack of
 13 consumer authorization. Doc. 32 at 12-13. While the 2011 average total return rate was 1.52%,
 14 during the “Debt2Wealth” campaign, Defendants’ total return rate was 54% for all payments
 15 processed by one unnamed processor. *Id.* at 13. Similarly, while the overall 2011 unauthorized
 16 return rate was 0.03%, during the “Funding Assurance Campaign,” the unauthorized return rate was
 17 approximately 2.7%. *Id.* The FTC alleges that the defendants massaged even these disproportionate
 18 figures by taking multiple *de minimis* unauthorized debts from consumer accounts and then
 19 refunding them as direct deposits, and not refunds, prior to deducting far larger amounts. *See id.* at
 20 14. It also alleges that Defendants established call centers in the United States and abroad to handle
 21 the heavy volume of consumer complaints, and that their call-center agents misrepresented the
 22 nature of the transactions in question. *Id.* at 15-16. The FTC alleges that Defendants hid their
 23 actions by using a number of shell entities, which share the same office space and commingle assets.
 24 *Id.* at 16.

25 The FTC sued Defendants on January 28, 2013, bringing three counts globally against all
 26 defendants in this case: unfair billing practices, deceptive billing practices, and deceptive statements
 27 that consumers authorized payment. Doc. 32 at 18-20. The FTC successfully sought a temporary
 28 restraining order against all defendants. Docs. 1; 2; 10. On February 14, 2013, the Court followed

1 up with a preliminary injunction that instituted, *inter alia*, an asset freeze to prevent “immediate and
 2 irreparable damage to this Court’s ability to grant effective final relief for consumers, including
 3 monetary restitution.” Doc. 18 at 3, 5. Upon issuing the preliminary injunction, the Court also
 4 appointed Thomas McNamara as receiver over Ideal. *Id.* at 8-9, 10-12.

5 **A. The FTC’s Second Motion to Strike Notice and Direct Clerk to Enter a Default**
 6 **[Doc. 145]**

7 The Court first considers the FTC’s Motion to Strike Defendant Steven Sunyich’s “notice,”
 8 Doc. 40, which advised that Ideal Financial, Ascot Crossing, LLC, Bracknell Shore, Chandon
 9 Group, Avanix, LLC, and Fiscal Fitness, LLC (“Corporate Defendants”) can not afford to retain
 10 counsel because all of the assets of the Corporate Defendants have been seized. Sunyich,
 11 purportedly on behalf of the Corporate Defendants, requested relief from their deadline to answer
 12 the FTC’s Amended Complaint. *Id.* at 1-2. Defendants Steven Sunyich, Christopher Sunyich,
 13 Michael Sunyich, Shawn Sunyich, and Melissa Sunyich Gardner answered the FTC’s complaint on
 14 April 25, 2013, both on their own behalf and “as officers and directors” of the Corporate Defendants
 15 and other unnamed entities. Doc. 41. None of the individual defendants are attorneys, and the FTC
 16 moved to strike both the notice (Doc. 40) and the answer *to the extent it was filed on behalf of any*
 17 *corporate entity*. The FTC also asks the Court to direct the Clerk of Court to enter a default against
 18 the Corporate Defendants for their failure to answer. Docs. 45 at 1-2; 46.

19 Although no response to the FTC’s motion was filed, the Court issued an Order on October
 20 3, 2013, noting that corporate entities may only appear in federal court through a licensed attorney.
 21 Doc. 99. It then denied the FTC’s motion without prejudice and provided the Corporate Defendants
 22 with 20 days to retain attorneys and file an answer to the FTC’s complaint. *Id.* at 2. The Court
 23 “strongly cautioned that failure to timely obtain proper representation or file a proper response may
 24 result in the striking of [Corporate Defendants’] Response . . . and the entry of default.” *Id.*

25 On October 25, 2013, Defendants Steven and Christopher Sunyich moved separately to
 26 “clarify” the order and requested that the Court permit additional time for the Corporate Defendants
 27 to obtain counsel, although neither defendant provided reasons for their extension requests. See
 28 Docs. 130 at 3; 131 at 3. By November 8, 2013, with no indication that any of the Corporate

1 Defendants had answered or otherwise taken steps to comply with the Court's order, the FTC re-
 2 urged its motion to strike and for entry of a clerk's default, noting that the Corporate Defendants'
 3 time for response has long-since passed. Doc. 145, 146.

4 Artificial entities like corporations, limited liability companies, and limited partnerships can
 5 only appear in Federal Court through licensed attorneys;² thus, pleadings filed on behalf of
 6 corporations by non-attorneys are of no effect. Under Federal Rule of Civil Procedure 15(a)(3),
 7 "Unless the court orders otherwise, any required response to an amended pleading must be made
 8 within the time remaining to respond to the original pleading or within 14 days after service of the
 9 amended pleading, whichever is later."³ "When a party against whom a judgment for affirmative
 10 relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or
 11 otherwise, the clerk must enter the party's default."⁴

12 The FTC has filed proof of service on all of the Corporate Defendants.⁵ The Court concludes
 13 that this proof establishes, by "affidavit or otherwise" that none of the Corporate Defendants
 14 answered the FTC's First Amended Complaint within the time period specified in the Federal Rules
 15 of Civil Procedure. Thus, a clerk's entry of default is warranted in this case against all of these
 16 entities. The FTC's motion is granted in this respect.

17 For the same reasons, the Court also grants the FTC's second request to strike any portions
 18 of Doc. 41, filed by the individual defendants, that purports to assert a defense on behalf of the
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20 ² *United States v. High Country Broadcasting Co., Inc.*, 3 F.3d 1244, 1245 (9th Cir. 2013) (citing
 21 Rowland v. California Men's Colony, 506 U.S. 194, 201-02 (1993)); 28 U.S.C. § 1654; *Lattanzio v. COMTA*,
 481 F.3d 137, 139-140 (2d Cir. 2007).

22 ³ Fed. R. Civ. Proc. 15(a)(3).

23 ⁴ *Id.* at 55(a).

24 ⁵ Ascot, Bracknell, and Avanix were served with the original complaint on February 1, 2013, Docs. 146-2
 25 at 2; 146-3 at 2; 146-6 at 2, and Ideal and Chandon were served on February 4, 2013. Docs. 146-1 at 2; 146-4
 26 at 2. Finally, according to a Declaration of Megan E. Gray, an FTC attorney, Receiver McNamara agreed to
 27 accept service by email on behalf of Fiscal Fitness on February 7, 2013. Doc. 146-5 at 2, 5. Admittedly, all of
 28 these service dates predate the filing of the Amended Complaint on April 10, 2013. However, Gray's affidavit
 indicates that she notified Defendants Steve Sunyich, Chris Sunyich, Michael Sunyich, Melissa Sunyich Gardner,
 Shawn Sunyich, the receiver, and counsel for Defendant Kent Brown, notifying them of their deadline to respond
 to the FTC's Amended Complaint. Doc. 146-5 at 2, 7. None of the Corporate Defendants filed a response to the
 motion to strike, although Defendants Christopher and Steven Sunyich acknowledge that the Corporate
 Defendants were obligated to respond to the Amended Complaint. See Docs. 130 at 3; 131 at 3.

1 Corporate Defendants. Accordingly, the Answer contained at Document 41 will be construed only
 2 as the answer of Steven Sunyich, Christopher Sunyich, Michael Sunyich, Shawn Sunyich, and
 3 Melissa Sunyich Gardner, individually. However, the Court denies the request to strike Steven
 4 Sunyich's "notice" at Doc. 40. Federal Rule of Civil Procedure 12(f) permits courts to "strike from
 5 a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."⁶
 6 The target of the FTC's request to strike is a "notice," not a pleading. Accordingly, the notice will
 7 be disregarded but not stricken.

8 **B. Defendants Michael and Melissa Sunyich Gardner's Motions to Dismiss**
 9 **[Docs. 103; 115]**

10 Michael Sunyich and Melissa Sunyich Gardner move to dismiss all of the FTC's allegations
 11 against them. Docs. 103; 115. In support of their requests, they offer a statement of "Relevant
 12 Facts" disputing the facts alleged in the complaint, provide exhibits for the Court to consider, and
 13 dispute the sufficiency of evidence supporting the complaint's allegations. *See* Docs. 103; 115. The
 14 FTC opposes the motion, arguing that the Court should disregard these defendants' self-serving
 15 assertions, all of which are unsupported by the record. *See* Docs. 121; 123.

16 **1. Standard for Dismissal**

17 Federal Rule of Civil Procedure 8(a) supplies the standard for pleadings in a federal cause of
 18 action and states, "[a] pleading that states a claim for relief must contain: (1) a short and plain
 19 statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim
 20 showing that the pleader is entitled to relief; and (3) a demand for the relief sought."⁷ A district
 21 court may dismiss a complaint for failing to state a claim upon which relief can be granted under
 22 Rule 12(b)(6).⁸ "To survive a motion to dismiss, a complaint must contain sufficient factual matter,
 23 accepted as true, to state a claim for relief that is plausible on its face."⁹ "[A] plaintiff's obligation

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 25 ⁶ Fed. R. Civ. Proc. 12(f).

26 ⁷ *Id.* at 8(a).

27 ⁸ Fed. R. Civ. Proc. 12(b)(6).

28 ⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1 to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,
 2 and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must
 3 be enough to raise a right to relief above the speculative level.”¹⁰ The Court is also “not bound to
 4 accept as true a legal conclusion couched as a factual allegation.”¹¹ To state a “plausible” claim for
 5 relief, the plaintiff must “plead[] factual content that allows the court to draw a reasonable inference
 6 that the defendant is liable for the misconduct alleged.”¹² This requires a plaintiff to state “enough
 7 facts to raise a reasonable expectation that discovery will reveal evidence” of the allegations
 8 charged.¹³

9 **2. No Conversion to Rule 56 Motions**

10 Michael and Melissa’s motions to dismiss contain neither citations to the record in this case,
 11 nor legal points and authorities that support the dismissal of the claims against them. Docs. 103;
 12 115. They do make repeated references to the sufficiency of the evidence¹⁴ and attach documents to
 13 their motions to dismiss, which they refer to in the course of laying out their respective positions.
 14 *See id.* The FTC contends that these motions rely on evidence outside of the pleadings and should
 15 be converted to motions for summary judgment. Docs. 121; 123. Consistent with that position, the
 16 FTC attaches a number of extraneous documents to its responses. *See id.*

17 Fed. R. Civ. Proc. 12(d) states that “[i]f, on a motion under Rule 12(b)(6) . . . matters outside
 18 the pleadings are presented to and not excluded by the court, the motion must be treated as one for
 19 summary judgment under Rule 56.”¹⁵ However, in considering a motion to dismiss, a district court
 20 may also consider material not physically attached to the complaint if its authenticity is not

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 22 ¹⁰ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

23 ¹¹ *Id.* (quoting *Papsan v. Allain*, 478 U.S. 265, 286 (1986)).

24 ¹² *Iqbal*, 556 U.S. at 678-79.

25 ¹³ *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011)
 26 (quoting *Twombly*, 550 U.S. at 556).

27 ¹⁴ Michael and Melissa claim, in conclusory fashion, that the FTC has produced “insufficient evidence”
 28 to support the allegations against them. *See* Docs. 103; 115. A motion to dismiss is used to evaluate the
 29 plausibility of the factual allegations, not the sufficiency of evidence. *See Iqbal*, 556 U.S. at 678.

¹⁵ Fed. R. Civ. Proc. 12(d).

1 contested and Plaintiff's complaint necessarily relies on that material without converting the motion
 2 to one for summary judgment.¹⁶ This "prevent[s] plaintiffs from surviving a Rule 12(b)(6) motion
 3 by deliberately omitting references to documents upon which their claims are based."¹⁷

4 Attached to both Michael and Melissa's motions is an organizational chart, purportedly
 5 showing the governing structure of Ideal Financial. Docs. 103 at 10; 115 at 9. Although the FTC's
 6 complaint may "rely" on the corporate structure of the various entities to establish Michael and
 7 Melissa's liability, the org chart only purports to establish the corporate structure of Ideal Financial,
 8 not Bracknell (which Michael is alleged to control), or Ascot (which Melissa is alleged to control).
 9 *See Doc. 32 at 4, 6.* Further, the documents are not dated, and in fact redact names from the
 10 organizational chart. *See id.* No affidavit or other evidence clarifies why the Court should overlook
 11 these omissions. The Court finds that the proffered organizational chart lacks circumstantial
 12 guarantees of trustworthiness, such that it would not be admissible on summary judgment even if
 13 conversion was appropriate, and the Court excludes this document from consideration in the context
 14 of these two motions.

15 Michael's motion also attaches an August 7, 2013, letter from Paula J. Stratford to U.S.
 16 District Judge Miranda Du. Doc. 103 at 12. The letter, which also contains a redaction on its upper
 17 left corner, purports to describe Stratford's relationship to Michael, indicating that Michael was part
 18 of an organization which provided charitable donations on behalf of starving children in third world
 19 countries. *See id.* This letter is both hearsay without any exception and irrelevant to the current
 20 claims against Michael, and the Court excludes it from consideration.

21 In sum, the Court declines to consider the additional "evidence" attached to either Michael or
 22 Melissa's motion, as this evidence is not admissible. Conversion to summary judgment is not
 23 appropriate under Rule 12(d). The Court also excludes from consideration the documents attached
 24 to the FTC's responses or Defendants' replies. Michael and Melissa's motions will be treated as
 25 Rule 12 motions to dismiss.

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 27 ¹⁶ *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (quotation omitted).

28 ¹⁷ *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998), superseded by statute on other grounds
 as recognized by *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006).

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2 **3. Merits of Dismissal Motions**

3 **a. Michael's motion [Doc. 103]**

4 Michael argues, in essence, that he was a low-level employee at Ideal Financial who did not
 5 have enough authority to be meaningfully involved in the unlawful scheme. Doc. 103 at 1-3.
 6 Instead, he was tasked with “establish[ing] relationships with third party companies in order to offer
 7 the products and services provided by these companies to the Other Defendants and customers to
 8 help put money back into the customers pocket.” *Id.* at 4. He also argues that he was not a
 9 signatory of and did not exercise control of any bank accounts or merchant accounts within the
 10 scope of the FTC’s complaint. Doc. 103 at 3-4.¹⁸ He also contends that he ceased working “with or
 11 for the Other Defendants or Companies since the end of September, 2012.” Doc. 103 at 2.
 12 Michael’s reply asserts that he was not in a position to know of any violations by members or
 13 officers of the companies he controlled. *See* Doc. 128 at 1-2.

14 The FTC responds by pointing out that when a defendant is a corporate officer of a small,
 15 closely held company, a presumption of control arises. Doc. 121 at 4. The FTC points to many
 16 pieces of evidence supporting its theories; however, the Court need not look past the allegations in
 17 its Complaint to find sufficient demonstration that (1) Michael was President of Bracknell, (2)
 18 Bracknell and other corporate entities were alleged to have participated in the scheme, and (3) the
 19 corporate entities were close corporations which shared assets and commingled funds. The FTC
 20 also alleges that Michael was aware of the consumer complaints regarding unauthorized billing and
 21 deception. Doc. 121 at 6. The FTC argues that even if Michael did not actually know about the
 22 consumer complaints, he was at least recklessly indifferent to them. *Id.* at 7.

23 The FTC alleges that Michael is President of Bracknell, and Vice President of Ideal
 24 Financial. Doc. 32 at 4. The FTC alleges that Michael “formulated, directed, controlled, had the
 25 authority to control, or participated in the acts and practices set forth in this Complaint,” and “knew

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 27 ¹⁸ Michael also claims he has been deprived of his property without due process of law. Doc. 103 at 1.
 28 Although not an attack on the FTC’s factual allegations, his argument is specious because the preliminary injunction under which his assets were frozen was issued after notice and a hearing to all parties, and during which Michael was represented.

1 of Defendants' unauthorized billing of consumer accounts and deceptive statements to consumers,
2 was recklessly indifferent to these acts, or was aware of a high probability of the fraud and
3 intentionally avoided the truth.” Doc. 32 at 4-6.

In its first count, the FTC charges Michael and Melissa with unfair billing practices pursuant to 15 U.S.C. §§ 45(a) and 45(n). Doc. 32 at 18. It claims that “in numerous instances Defendants obtain[ed] consumers’ bank account and credit card account information and have caused billing information to be submitted for payment on those accounts without consumers’ express informed consent.” *Id.* The FTC alleges that these actions have, or are likely to, cause substantial injury to consumers, which “is not outweighed by countervailing benefits to consumers or competition.” *Id.*

The FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.”¹⁹ Courts regularly find unauthorized billing to be unfair.²⁰ Alternatively, “[a]n act or practice is deceptive if ‘first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.’”²¹ Unauthorized charges to consumer credit cards and bank accounts may violate the FTC Act if the alleged actions (1) cause substantial injury (2) that consumers cannot reasonably avoid and (3) is not outweighed by countervailing benefits to consumers or

17 competition.²² The FTC’s second and third counts are brought under 15 U.S.C. § 45(a). In
18 its second count, the FTC charges Michael and Melissa with deceptive billing practices pursuant to
19 15 U.S.C. § 45(a). Doc. 32 at 19. The FTC alleges that “Defendants represent, directly or
20 indirectly, expressly or by implication, that consumers have authorized Defendants’ charges on
21 consumers’ credit cards,” which in many instances were not authorized, such that the representations
22 were “false or misleading” in violation of 15 U.S.C. § 45(a). *Id.*

23 In its third count, the FTC charges Michael and Melissa with deceptive statements that

¹⁹ 15 U.S.C. § 45(a).

²⁶ ²⁰ *FTC v. Inc21.com*, 745 F. Supp. 2d 975, 1003-05 (N.D. Cal. 2010); *FTC v. J.K. Publications*, 99 F. Supp. 2d 1176, 1203 (C.D. Cal. 2000).

²¹ *F.T.C. v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001).

²² 15 U.S.C. § 45(n).

1 consumers authorized payment, because when consumers contacted them to seek refunds, the
 2 “Defendants represent[ed], directly or indirectly, expressly or by implication, that consumers are not
 3 entitled to a refund because they agreed: (a) to purchase Defendants’ products or services, and (b) to
 4 authorize Defendants to debit money from consumers’ bank accounts to pay for Defendants’
 5 products or service.” Doc. 32 at 19. Because not all consumers agreed with this state of affairs, the
 6 FTC alleges that “Defendants’ representations . . . [were] false or misleading and constitute[d]
 7 deceptive acts or practices in violation of . . . 15 U.S.C. § 45(a).” *Id.* at 20.

8 A defendant violates 15 U.S.C. § 45(a) with respect to a deceptive billing practices allegation
 9 where the practice: “(1) . . . is likely to mislead consumers acting reasonably under the
 10 circumstances (2) in a way that is material.”²³ “To determine whether a representation, omission, or
 11 practice is likely to mislead, the Court considers the overall net impression the representation
 12 creates.”²⁴ Moreover, a material representation “involves information that is important to consumers
 13 and, hence, likely to affect their choice of, or conduct regarding, a product.”²⁵ Express claims are
 14 presumed material,²⁶ and the FTC does not have to prove actual reliance by consumers.²⁷

15 Finally, individual defendants are liable for violations of the FTC Act and subject to
 16 injunctive relief if they either participate in the violations, or have authority to control them.²⁸ When
 17 an individual defendant acts as a corporate officer of a small, closely held company, courts presume
 18 that officer had control over its operations.²⁹

19 Michael’s motion simply fails to demonstrate, *inter alia*, that he was not a member of
 20 Bracknell, that he was not listed as an executive officer of Bracknell, or that Bracknell did not

22 ²³ *F.T.C. v. Cyberspace.com*, 453 F.3d 1196, 1199 (9th Cir. 2006).

23 ²⁴ *F.T.C. v. Publishers Business Services*, 821 F. Supp. 2d 1205, 1223 (D. Nev. 2010) (citing
Cyberspace.com, 453 F.3d at 1200).

24 ²⁵ *Cyberspace.com*, 453 F.3d at 1201.

25 ²⁶ *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994).

26 ²⁷ *F.T.C. v. Figgie International*, 994 F.2d 595, 605-06 (9th Cir. 1993).

27 ²⁸ *F.T.C. v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997).

28 ²⁹ *Id.* at 1170-71.

1 engage in the unfair practices outlined in any of the three counts described above. Having done
 2 nothing to convince the Court that the FTC's allegations fail to allege plausible claims for relief
 3 against him with respect at least to Bracknell, Michael's motion to dismiss [Doc. 103] is denied.

4 **b. Melissa's Motion [Doc. 115]**

5 Like Michael, Melissa argues that she had not been "employed by or worked with or for the
 6 Other Defendants or Companies since 2006." Doc. 115 at 1. She claims that she was not a
 7 "decision maker" and did not have control of any bank accounts material to the FTC's allegations,
 8 and that she "resigned" in 2006, although it is not clear from what company she resigned from. *Id.*
 9 at 3-4.

10 The FTC's response largely rehashes the points it made in response to Michael's motion and
 11 points out that when a defendant is a corporate officer of a small, closely held company, a
 12 presumption of control arises. Doc. 123 at 4. The FTC argues that (1) Melissa was the director of
 13 Ascot, (2) Ascot and other corporate entities were alleged to have participated in the scheme, and (3)
 14 the corporate entities were close corporations that shared assets and commingled funds. The FTC
 15 also alleges that Melissa was aware of the consumer complaints regarding unauthorized billing and
 16 deception or she was at least recklessly indifferent to them. *Id.* at 6-7. The FTC's complaint alleges
 17 that Melissa owned Ascot Crossing and she "formulated, directed, controlled, had the authority to
 18 control, or participated in the acts and practices set forth in this Complaint" and "knew of
 19 Defendants' unauthorized billing of consumer accounts and deceptive statements to consumers, was
 20 recklessly indifferent to these acts, or was aware of a high probability of the fraud and intentionally
 21 avoided the truth." Doc. 32 at 4-6.

22 Melissa does not mention Ascot in her motion to dismiss, and her reply admits that the FTC
 23 has shown that she was the manager of Ascot. Doc. 141 at 4. Her motion to dismiss simply fails to
 24 show, *inter alia*, that she was not a member of Ascot or that Ascot did not engage in the transactions
 25 that form the basis of the FTC's claims against her. Melissa does claim in her reply that Ascot had
 26 "zero" complaints, *see* Doc. 141, but a motion to dismiss is designed to evaluate the plausibility of
 27 the factual allegations in the complaint and determine whether discovery could lead to evidence
 28 supporting the claims, not to test the veracity of those factual allegations. Melissa's motion either

1 gestures to evidence that is not properly before the Court, or challenges facts that can be ascertained
2 in discovery; it does nothing to demonstrate that the FTC's allegations fail to allege plausible claims
3 for relief against her. Melissa's motion to dismiss [#115] is denied.

Conclusion

5 Accordingly, and based on the foregoing reasons,

6 **IT IS HEREBY ORDERED** that Defendant Michael Sunyich's Motion to Dismiss [Doc.
7 103] is **DENIED**.

8 **IT IS FURTHER ORDERED** that Defendant Melissa Sunyich Gardner's Motion to
9 Dismiss [Doc. 115] is DENIED.

10 **IT IS FURTHER ORDERED** that the FTC's Second Motion to Strike Notice and Direct
11 Clerk to Entry a Default [Doc. 145] is **GRANTED**.

12 To the extent that the April 25, 2013, answer [Doc. 41] purports to be entered on behalf of
13 Ideal Financial Solutions, Inc.; Ascot Crossing, LLC; Bracknell Shore, Ltd.; and Chandon Group,
14 the answer [Doc. 41] is STRICKEN.

15 The Clerk of Court is directed to **enter default** against Ideal Financial Solutions, Inc.; Ascot
16 Crossing, LLC; Bracknell Shore, Ltd.; Chandon Group; Avanix, LLC; and Fiscal Fitness, LLC.

17 || DATED June 5, 2014

JENNIFER A. DORSEY
UNITED STATES DISTRICT JUDGE